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No. 08-1259

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IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Argument

The purpose of this reply in support of petitioners' application for a writ of certiorari, is as follows:

(1) The meaning of the word "service" in the Airline Regulation Act, 49 U.S.C. § 41713(b)(1), was made clear by Congress in enacting that statute.

The legislative history of that statute clearly shows that Congress used the word "service" in the context of making available or modifying airline transportation in a particular geographical area.

The singular (and not the plural) of the word "service" in the statute, was not used to mean how the airline treats its passengers and the responsibility of the airline for such treatment.

As an example, House Report No. 95-121 repeatedly shows that "serves" and "service" were used by Congress to mean furnishing airline transportation service. Thus, as some examples, the following appear in that legislative committee report:

> If an airline wishes to change the cities it serves or the price it charges, it first must seek permission from the CAB. (p. 3737)
>
> * * * *
>
> From the standpoint of the travelling public there was evidence that the pre-1975 regulatory system was discouraging experiments with low-fare service which could have benefited the industry and the public. (p. 3738)
>
> * * * *
>
> In dormant markets served by two or more carriers, CAB will be required to authorize replacement service in 60 days unless CAB finds that

> replacement service would be inconsistent with public convenience and necessity. (p. 3740-3741)
>
> * * * *
>
> Other important provisions of H.R. 12611 are the 10-year guarantee of continued air service for small communities * * * (p. 3741)
>
> * * * *
>
> H.R. 12611 modifies several provisions of section 406 to insure that the added competition resulting from H.R. 12611 will not have an undue impact on the local service carriers or the communities they service. (p. 3748)

Similarly, the bill was considered in the Senate, and then went to a Conference Committee. In all instances, the word "service" had the same meaning of airline service to a particular geographical location. Thus, as one example, the Conference Committee stated (*above U.S. Code Congressional and Administrative News, at 3786*):

> If any carrier terminates service for which it had previously received compensation, however, it shall no longer be eligible to receive compensation under Section 406 if that service is later resumed, but it will be able to apply for and receive compensation for such service under section 419.

As a further example of the legislative use of the word "service", the Conference Committee stated (*Id. at 3807*):

> The amendment also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB

> has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the state. The amendment provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

It is clear that Congress intended the word "service" to mean the presence of airline transportation at or between geographical locations. The word "service" is not used in the statute to mean how the airline treats its customers. The statute was not intended to preempt a court suit based on state tort law.

(2) The legislative history of the statute shows no intent to insulate an airline from liability for its abusive treatment of a passenger. For its torts committed by an airline against a passenger, the airline remains liable under state law.

(3) *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), does not insulate an airline from liability for its torts under state law. That decision does not resolve the conflict between the Court of Appeals for the Second Circuit and the Courts of Appeals for the Third and Ninth Circuits.

Conclusion

Respondent argues the merits of the second count of the complaint. We respectfully submit that to be improper at the present stage. Jury trial has been claimed in this case.

The statute (Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) does not prohibit the state tort law action.

Respectfully submitted,

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